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No. 88-1756

In the Supreme Court of the United States

OCTOBER TERM, 1989

L. STEVEN PLATT, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN OPPOSITION

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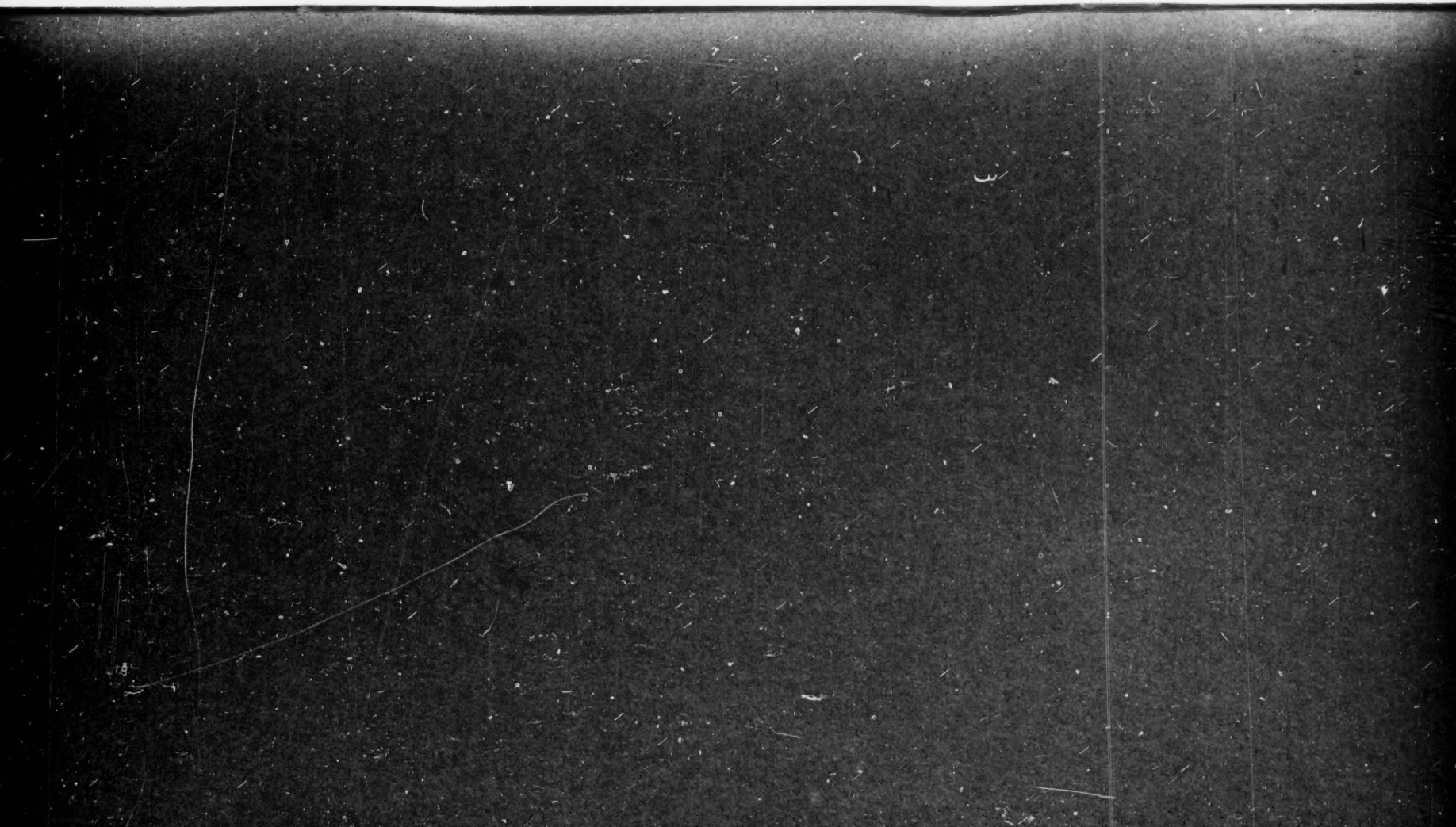

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in imposing costs on petitioner under Fed. R. App. P. 38 for filing a frivolous appeal, when the brief petitioner submitted in the court of appeals included a number of material misrepresentations and failed to address the reasons that the district court gave for ruling against petitioner's client.

2. Whether the court of appeals abused its discretion in imposing a $1,000 fine on petitioner under Fed. R. App. P. 46(c) for conduct unbecoming a lawyer, when petitioner's brief on appeal made material misrepresentations of fact and law.

3. Whether petitioner received adequate notice and hearing concerning potential discipline for these misrepresentations, when his opponents' briefs identified the misrepresentations and requested sanctions, petitioner had an opportunity in his reply brief to explain the statements, and the court of appeals questioned him at length during oral argument concerning the accuracy of the statements.

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BRIEF FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 865 F.2d 134. The memorandum opinion and order of the district court (Pet. App. 15a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989. A petition for rehearing with suggestion for rehearing en banc was denied on February 7, 1989. Pet. App. 26a. The petition for a writ of certiorari

was filed on April 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

Petitioner L. Steven Platt is an attorney who represented a client in an unsuccessful appeal to the United States Court of Appeals for the Seventh Circuit. He now names the court of appeals as a respondent in a petition asking this Court to review the assessment of costs against him under Fed. R. App. 38 for taking a frivolous appeal and the imposition of a fine of $1,000 under Fed. R. App. P. 46 for conduct unbecoming a member of the bar. This routine, fact-bound attorney discipline dispute does not warrant further review.

1. In 1986 Ronald Mays, a part-time paper handler at the Chicago Sun-Times, sued the Sun-Times and the Chicago Paper Handlers Union in state court alleging that the newspaper refused to hire him for a full-time position as a paper handler because of his race and that the union failed adequately to represent him. The Sun-Times and the union removed the case to the United States District Court for the Northern District of Illinois.

After taking Mays' deposition, the Sun-Times and the union moved for summary judgment under Fed. R. Civ. P. 56. At that point, Mays retained petitioner Platt, who filed an opposition to the motion for summary judgment, attaching Mays' deposition and affidavits from two former full-time paper handlers at the Sun-Times, Robert Myers and Lylbum French. The defendants then deposed Myers and French and filed reply briefs.

On November 12, 1987, the district court granted summary judgment for the defendants. The court found

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[1] On July 12, 1989, this Court requested that the court of appeals file a response to the petition by August 11, 1989. Subsequently, on August 1, 1989, the Court granted an extension of time until September 5, 1989, for the court of appeals to respond.

that the "broad conclusory statements" by Mays, Myers, and French failed to set forth "specific facts" concerning the union's participation in hiring decisions, as required by Rule 56(e).[2] The court also held that Mays had "presented no evidence whatsoever" of inadequate representation by the union. Pet. App. 18a.

As to the claim against the Sun-Times, the district court first found that Mays' direct evidence, consisting of alleged racially-discriminatory statements by a Sun-Times supervisor, either did not suggest discrimination or lacked sufficient contextual relationship to create a genuine issue of material fact regarding the treatment of Mays himself. Pet. App. 19a. Turning to Mays' indirect evidence of discrimination, the district court questioned whether Mays had established a *prima facie* case sufficient to impose a burden on the Sun-Times to justify its hiring decision. But even assuming that he had, the court found that the evidence failed to create a genuine issue of material fact on the critical issue of whether the Sun-Times' asserted reason for not hiring Mays—that the persons hired had greater qualifications and experience—was a pretext for discrimination.[3] Pet. App. 20a-21a.

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[2] Rule 56(e) provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * * When a motion for summary judgment is made and supported as provided in this rule, * * * the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[3] The affidavits that petitioner filed disputed the Sun-Times' justification for its decision but were insufficient under Rule 56 because the affiants acknowledged in their depositions that they had no personal knowledge of the experience or qualifications of the persons hired. Pet. App. 20a-21a. In addition, although the affiants claimed that their own experience proved (contrary to the Sun-

2. Mays appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, and petitioner filed a brief on his behalf. The brief argued that the district court had "improperly weighed the evidence" concerning the union's alleged participation in the hiring decisions (Appellant's Br. 7) and had "ignored evidence" of inadequate representation by the union (*id.* at 9). (We have lodged with the Court copies of the briefs filed in the court of appeals.)

Concerning the claim against the Sun-Times, petitioner's brief first represented, inaccurately, that the district court held that Mays had presented a *prima facie* case of discrimination. Appellant's Br. 10-11.[4] The brief then summarized the same deposition and affidavit testimony that had been offered in opposition to the motion for summary judgment in an effort to show that the district court "ignored evidence of racial hostility by the decision-makers" (*id.* at 11), "ignored plaintiff's pretext evidence" (*id.* at 13), and improperly "made credibility findings" (*id.* at 15). Despite the district court's decision analyzing the deficiencies of Mays' evidence, petitioner's brief made no attempt to demonstrate that the proffered testimony met the requirements of Rule 56(e).

Appellees' briefs called petitioner to task for various other misrepresentations. Indeed, the union's brief explicitly requested sanctions under 28 U.S.C. 1912 and Fed. R. App. P. 38 on the ground that petitioner's brief misstated the record and made a "scurrilous" misrepresentation when it claimed that the union "ha[d] been

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Times' justification) that full-time paper handlers were not required to have experience operating lift trucks, the district court found (Pet. App. 21a) that the affiants' assertions were irrelevant because they had been hired before the Sun-Times imposed the requirement of lift truck experience.

[4] In fact, the district court stated that "plaintiff may have failed to present a prima facie case," but it "assume[d] for purposes of analysis that plaintiff ha[d] met his burden" to establish a *prima facie* case. Pet. App. 20a.

cited by [the Seventh Circuit in a prior case] for its disgraceful hiring and employment record." Union Br. 13, 9 & n.4; see Appellant's Br. 3. The Sun-Times' brief, although it did not seek sanctions, likewise accused petitioner of "flagrantly misstating and fabricating evidence in his Brief" (Sun-Times Br. 1) and provided numerous examples to substantiate this charge. See Sun-Times Br. 11-12, 18, 21 n.*, 25 n.*, 26-27 & n.*, 29 n.*, 30 n.*.

Petitioner filed a three-page reply brief that failed to respond either to the union's request for sanctions or to the Sun-Times' accusations of misrepresentations. At oral argument, the court of appeals questioned petitioner at length concerning the accuracy of various representations in his opening brief. Petitioner responded that the statements were true, although he "sincerely apologize[d]" if "counsel and * * * this court" had interpreted his brief to indicate that the court of appeals had previously found the union guilty of discrimination.

3. The court of appeals affirmed the district court's grant of summary judgment to the defendants. Pet. App. 1a. In addition, the court imposed sanctions against petitioner personally, charging him with costs under Rule 38 for pursuing a frivolous appeal and fining him $1,000 under Rule 46(c) "for filing a brief with this court containing statements not well grounded in fact or law." Pet. App. 2a.

In imposing Rule 38 sanctions, the court of appeals employed a two-part analysis established by prior cases, looking first to whether the appeal was frivolous and then to whether sanctions were appropriate. To determine whether the appeal was "in fact frivolous," the court followed prior circuit precedent establishing that "'[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit.'" Pet. App. 8a (quoting *Indianapolis Colts* v. *Mayor and City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985)).

In explaining this standard, the court observed that "an appeal is frivolous when the appellant merely restates arguments that the district court properly rejected." Pet. App. 8a (citing *Spiegel* v. *Continental Ill. Nat'l Bank*, 790 F.2d 638, 650 (7th Cir.), cert. denied, 479 U.S. 987 (1986)). The court found the appeal frivolous because petitioner's only argument—"that the affidavits submitted by French and Myers sufficed to defeat a motion for summary judgment"—had been "considered, and in our view properly rejected by the district court." Pet. App. 8a.

Having determined that petitioner's appeal was frivolous, the court of appeals considered whether sanctions were appropriate. The court explained that "[s]anctions are appropriate if 'the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy.'" Pet. App. 8a (quoting *Reid* v. *United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)). Applying this standard, the court of appeals held that "the district court's opinion cogently explained why plaintiff's affidavits were not sufficient to defeat a motion for summary judgment." Accordingly, petitioner "could not have had a reasonable expectation that the same arguments would prevail in this court and merely delayed the inevitable by filing this appeal." Pet. App. 9a.

Finally, the court of appeals concluded that petitioner's brief "contain[ed] several statements that are not well-grounded in fact or law" and that a fine was warranted under Rule 46(c), which authorizes discipline of an attorney for "conduct unbecoming a member of the bar." Pet. App. 12a. The "most egregious example" was petitioner's "very serious charge" that the union had been "'*cited* by [the Seventh Circuit] for its disgraceful hiring and employment record'"—a charge that was not "even indirectly support[ed]" by the decision petitioner

cited. Pet. App. 11a (emphasis in court's opinion).[5] But this was "not the only such statement contained in his brief." *Ibid.* For example, the brief asserted that "[n]o one disputes that both the union and the Sun-Times have a dismal record of hiring and employing minorities in full-time paper handler positions" (Appellant's Br. 3) —although in fact both the Sun-Times and the union had vigorously challenged that characterization. Pet. App. 11a. The brief also asserted that Lylbum French was "fired after filing a race discrimination charge" (Appellant's Br. 5), when in fact French had been fired by the Sun-Times before he filed a charge against the newspaper. Pet. App. 11a.

To determine whether petitioner's misrepresentations warranted disciplinary sanctions, the court of appeals took guidance from Fed. R. Civ. P. 11, which requires that all papers signed by an attorney be "well grounded in fact and * * * warranted by existing law." The court followed previous decisions recognizing that "Rule 11 'is not incorporated by reference or otherwise in any rule of this court' " but that the rule helps to define "conduct unbecoming a member of the bar" under Rule 46. Pet. App. 10a (quoting *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986)).

Addressing the notice and hearing requirements of Rule 46(c), the court of appeals first concluded that "a hear-

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[5] As the court of appeals pointed out, the union's hiring practices were not at issue in that case (Pet. App. 11a n.4), and the only passage in the opinion that bore any relation to petitioner's allegation stated:

> In a letter to the Union, the Tribune expressed concern with respect to what it perceived to be an increase in the number of lawsuits challenging hiring practices as discriminatory and its view that employers who hire through union callrooms would not be insulated from liability in the event a union's hiring practices were found to be unlawful.

Graphic Communications Union v. *Chicago Tribune Co.*, 794 F.2d 1222, 1224 (7th Cir. 1986).

ing is not required when it would not assist the court in reaching its decision." Pet. App. 10a n.3. The court subsequently substituted for that statement the following (*id.* at 13a-14a):

> [T]he brief submitted by the Union requested sanctions based on the misrepresentations contained in appellant's brief. Therefore, [petitioner] was on notice that disciplinary action might be forthcoming. [Petitioner] was afforded the opportunity to explain why he should not be sanctioned for the statements in his brief at oral argument where we repeatedly questioned him about the veracity of these statements. Finally, [petitioner] did not request a hearing on possible sanctions. Consequently, Rule 46 sanctions may be imposed in this case.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and presents only a fact-bound issue concerning the imposition of attorney discipline in the particular circumstances of this case. We are advised, moreover, that the procedures to be followed in imposing sanctions on appeal are currently under consideration by the Advisory Committee on the Federal Rules of Appellate Procedure. Review by this Court is therefore unwarranted.[6]

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[6] The court of appeals has filed this brief at the request of the Court, but with serious reservations as to whether the court of appeals is properly named as respondent. Normally, the parties before this Court on a petition for certiorari are the "parties to the proceeding in the court whose judgment is sought to be reviewed" (S. Ct. R. 19.6). This Court, in the mandamus context, has noted its reluctance to make courts and judges parties in adversarial disputes. See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). Insofar as the petition seeks review of the award of costs under Rule 38, we see no reason why the proper respondents are not the Sun-Times and the union, to whom the costs must be paid. The Rule 46 fine was payable to the United States Treasury. The proper respondent on that issue would seem to be the

I. The Court of Appeals Applied Proper Standards in Determining that the Appeal Was Frivolous Under Rule 38.

Petitioner's attack on the sanctions imposed under Rule 38 (Pet. 15-17) is based on an untenable construction of the court of appeals' opinion. According to petitioner, language in the opinion defining a "frivolous" appeal under Rule 38—"when the appellant merely restates arguments that the district court properly rejected" (Pet. App. 8a)—"could easily apply to most appeals in which the judgment below is affirmed." Pet. 16. In short, petitioner suggests that the Seventh Circuit imposes Rule 38 sanctions simply for an unsuccessful appeal. See also Chicago Council of Lawyers Amicus Br. 4. Obviously such a standard would be erroneous.

The court of appeals does not, however, apply such a standard. Petitioner omits to quote the preceding sentence of the court's opinion, which makes clear that "'[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit.'" Pet. App. 8a (citation omitted). This standard, which provides wide latitude for unsuccessful yet nonfrivolous appeals, is uncontroversial and, indeed, is employed by at least six other circuits. See, *e.g.*, *Reliance Ins. Co.* v. *Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986); *Standard Terry Mills, Inc.* v. *Shen Mfg. Co.*, 803 F.2d 778, 783 (3d Cir. 1986); *Coghlan* v. *Starkey*, 852 F.2d 806, 811 (5th Cir. 1988); *Insurance Co. of N. Am.* v. *Bay*, 784 F.2d 869, 872 (8th Cir. 1986); *Taylor* v. *Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (per

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United States. This Court treated the Eighth Circuit as a respondent in *In re Snyder*, 472 U.S. 634 (1985), another Rule 46 case, but *Snyder* involved suspension of an attorney, not a fine payable to the United States as in this instance.

Despite these reservations, the instant brief is filed on behalf of the court of appeals pursuant to this Court's request.

curiam); *Braley* v. *Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc).

That the Seventh Circuit does not impose sanctions merely for unsuccessful appeals is further shown by the second part of its Rule 38 analysis, which also must be satisfied. For sanctions to be appropriate, an appeal must have been " 'prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy.' " Pet. App. 8a (quoting *Reid* v. *United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)).

The Seventh Circuit has frequently stated that " '[a] frivolous appeal means something more to us tha[n] an unsuccessful appeal.' " *Oglesby* v. *RCA Corp.*, 752 F.2d 272, 280 (7th Cir. 1985) (quoting *NLRB* v. *Lucy Ellen Candy Div.*, 517 F.2d 551, 555 (7th Cir. 1975)); accord *Reid*, 715 F.2d at 1154. And the cases are legion in which the Seventh Circuit has rejected an appellant's arguments but found sufficient merit in them to deny Rule 38 sanctions. See, *e.g.*, *Staff Builders Services, Inc.* v. *NLRB*, No. 88-2308, slip op. at 10 (July 13, 1989) (decided *after* this case) ("although [appellant] was skating on thin ice, we deny the request for sanctions"); *United Steelworkers of Am.* v. *Danly Mach. Corp.*, 852 F.2d 1024, 1028 (1988) (the appellant's arguments, "though ultimately inapplicable in this case, had credence"); *Local 106* v. *Homewood Memorial Gardens, Inc.*, 838 F.2d 958, 961 (1988) (the appellant's "position is wrong, but not unwarranted"); *CNPA* v. *Chicago Web Printing Pressman's Union No. 7*, 821 F.2d 390, 398 (1987) ("[w]hile we disagree with [appellant's] novel argument, we refuse to say that it is without merit"); *Blau Plumbing, Inc.* v. *S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (1986) ("[a]lthough [the appellant's] case is weak, the resolution of the case on [the appellee's] motion for summary judgment, while proper, was sufficiently debatable to prevent us from deeming the appeal frivolous"); *McConnell* v.

Surak, 774 F.2d 746, 752 (1985) (affirming the district court but concluding that the appeal "was not frivolous or meritless"); *Freeman* v. *Local Union No. 135*, 746 F.2d 1316, 1322 n.13 (1984) (although appellant "cited no cases in support of his contention, * * * his position on the issue is not unreasonable").

Indeed, in several cases the Seventh Circuit, while affirming the district court's judgment in the appellee's favor, has nonetheless sanctioned the *appellee* for bringing a frivolous request for sanctions on appeal. See, *e.g.*, *Foy* v. *First Nat'l Bank*, 868 F.2d 251, 258 (1989) (decided *after* this case) ("[W]e rebuke—we more than rebuke, we punish—Foy for his frivolous argument that the bank should be sanctioned for filing this appeal. Although we have ruled against the bank, it is obvious that the appeal is not frivolous"); *Meeks* v. *Jewel Companies*, 845 F.2d 1421, 1422 (1988). Cf. *SK Hand Tool Corp.* v. *Dresser Indus.*, 852 F.2d 936, 946 (7th Cir. 1988), cert. denied, 109 S. Ct. 3241 (1989) (declining to sanction appellee but adding: "[W]e are sharply critical of the attitude that sanctions requests can with impunity automatically attach to any appeal. We expect counsel to give considerable thought to whether an appeal is frivolous before requesting Rule 38 sanctions"). Thus, the court of appeals has acted vigorously to ensure that not "[e]very appellee who persuades the Court to affirm the reasoning of the district court" will file for sanctions, as *amicus* predicts will happen. Amicus Br. 4.

As these cases show, the court of appeals' practice under Rule 38 is fully consistent with this Court's own recent statement in *Talamini* v. *Allstate Ins. Co.*, 470 U.S. 1067 (1985), that damages should be assessed under S. Ct. R. 49.2 for a frivolous appeal or petition for certiorari only where the filing has "no legitimate prospect of success." *Id.* at 1071 (Stevens, J., writing for four-Justice plurality); see also *id.* at 1073 (Burger, C.J., writing for three Justices) (award of damages

proper under Rule 49.2 to discourage "patently meritless" filings).

Similarly, this Court's decision in *Neitzke* v. *Williams*, 109 S. Ct. 1827 (1989), far from casting doubt on the court of appeals' approach, shows that the court of appeals accurately distinguishes frivolousness from error. In *Neitzke*, this Court affirmed the Seventh Circuit's decision that an *in forma pauperis* complaint is not "frivolous" within the meaning of 28 U.S.C. 1915(d) merely because it fails to state a claim for which relief can be granted. 109 S. Ct. 1827, aff'g *Williams* v. *Faulkner*, 837 F.2d 304 (7th Cir. 1988) (opinion for the court of appeals by Judge Flaum, who wrote the opinion in this case).

Thus, we entirely agree with petitioner that it is not inherently improper for an appellant to base an appeal upon arguments that the district court has rejected. What is wholly unjustifiable, however, is to repeat those arguments without addressing or attempting to refute the reasons or authorities relied on by the district court or the findings it made in arriving at its ruling. See, *e.g.*, *Spiegel*, 790 F.2d at 650 ("perfunctory" brief "failed to explain how the district court decision was in error"). Similarly, the " 'tactic of pretending that potentially dispositive authority against a litigant's position does not exist' " is "unprofessional" and sanctionable under Rule 38. *Mars Steel Corp.* v. *Continental Bank N.A.*, No. 88-1554, slip op. at 19 (7th Cir. July 20, 1989) (quoting *Hill* v. *Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987)).

Several circuits agree with the Seventh Circuit that such a perfunctory appeal is frivolous under Rule 38.[7]

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[7] See, *e.g.*, *Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), cert. denied, 469 U.S. 1018 (1984) ("[Appellant] has absolutely failed to present any arguable reason why the district court erred in its disposition. She basically restates arguments that the district court properly rejected"); *Coghlan*, 852 F.2d at

The courts of appeals must be able to enforce this standard to protect their already-crowded dockets against insubstantial appeals. " 'Counsel must realize that the decision to appeal should be a considered one, *taking into account what the district judge has said*, not a knee-jerk-reaction to every unfavorable ruling.' " *Libby, McNeill, & Libby* v. *City Nat'l Bank*, 592 F.2d 504, 515 (9th Cir. 1978) (emphasis added) (quoting *Simon & Flynn, Inc.* v. *Time Inc.*, 513 F.2d 832, 835 (2d Cir. 1975) (per curiam)).

In this case, petitioner's appellate brief—while contending that the district court had "disregarded" the statements of Mays, Myers, and French—utterly failed to address the reasons and authority that the district court gave for disregarding those averments. For example, the district court, relying on Rule 56, refused to consider all but one of the assertions of Myers and French concerning the qualifications of the two white individuals hired as paper handlers because those assertions were not based on their personal knowledge (Pet. App. 21a).[8]

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809 (appellant's brief "makes hardly any attempt to distinguish precedents relied on below * * * and offers no independent legal analysis different from that decisively rejected by the district court"); *Olympia Co.* v. *Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985) ("appellate counsel made no attempt to address most of the issues raised in the district court's opinion"); *Libby, McNeill, & Libby* v. *City Nat'l Bank*, 592 F.2d 504, 514 (9th Cir. 1978) (appellant "has made no serious attempt to undermine the district court's basic conclusion").

[8] The only exception was Myers' allegation that one of the paper handlers (Craig) "asked me to teach him how to operate a lift truck." See Pet. App. 20a. The district court observed, however, that Myers had actually testified in his deposition that Craig simply asked him "how the levers functioned on the Jeep"—the particular model of lift truck. The court found Myers' statement insufficient to create a genuine issue of material fact concerning whether Mays was equally qualified as those hired. *Id.* at 21a. That conclusion was unassailable in view of the uncontroverted evidence that the individuals hired each had several years of full-time experience as paper handlers.

Yet petitioner's brief made no attempt either to show that the affiants had such knowledge or to defend the legal proposition that such knowledge was unnecessary. Likewise, again in total disregard of Rule 56 and the district court's reasoning (*ibid.*), the brief made no effort to show why the hiring of Myers and French, which occurred before the Sun-Times adopted a policy requiring lift truck experience, was relevant to hiring decisions once the policy was in effect.[9] Instead, referring repeatedly to his own opposition to the summary judgment motion, petitioner simply asserted that the district court made credibility determinations not appropriate at the summary judgment stage, when in fact the court's reasoning rested not on credibility but on lack of foundation.

The imposition of Rule 38 sanctions also was supported by the repeated misrepresentations in petitioner's brief (although the court of appeals relied explicitly on this ground only in imposing Rule 46 sanctions). See pp. 18-20, *infra*. It is generally recognized that "misstatements and misrepresentations of the record [may] further demonstrat[e] frivolousness" and thereby warrant Rule 38 sanctions. *Borowski* v. *DePuy, Inc.*, 850 F.2d 297, 306 (7th Cir. 1988); accord *Ortiz Villafane* v. *Segarra*, 797 F.2d 1, 2 (1st Cir. 1986) (awarding double costs and attorney's fees against counsel under Rule 38 for "blatant misrepresentations in appellant's brief"); *Medina* v. *Chase Manhattan Bank, N.A.*, 737 F.2d 140, 145 (1st Cir. 1984) (awarding double costs as "punitive sanctions * * * in view of the misstatements and misrepresentations contained in the plaintiff's appellate brief"); *Chalfy* v. *Turoff*, 804 F.2d 20, 23 (2d Cir. 1986) (awarding

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[9] The brief significantly misstated the district court's opinion in this respect, saying only that the court had held that Myers' and French's testimony was irrelevant "because their knowledge was based on service under a prior supervisor" (Appellant's Br. 13) and omitting to mention the change in the hiring policy on which the district court had placed equal reliance (see Pet. App. 21a).

attorney's fees, costs, and expenses under Rule 38 where appellants' brief, among other things, "mischaracterizes even their own affidavits"); *Herzfeld & Stern* v. *Blair*, 769 F.2d 645, 647 (10th Cir. 1985) (awarding double costs and attorney's fees under Rule 38 against counsel whose misrepresentations of the record "added grievously to the frivolous nature of this appeal"); *Paulik* v. *Rizkalla*, 796 F.2d 456, 460 (Fed. Cir. 1986) (awarding double costs for "flagrant misrepresentations of the record").

In short, the language on which petitioner and his *amicus* focus, read in the context of the surrounding sentences and other Seventh Circuit decisions, plainly does not constitute a free-standing test for identifying a frivolous appeal. To the contrary, the court of appeals' decision to assess costs on petitioner under the particular facts of this case was based on well-established criteria over which the circuits substantially agree. There is no reason to suppose that any other circuit would reach a different result on this record.

II. The Court of Appeals Acted Properly in Sanctioning Petitioner Under Rule 46(c) for Repeated Misrepresentations.

Petitioner raises two objections to the fine that the court of appeals imposed on him for repeated misrepresentations in his appeal brief. Neither objection has any merit, and both present factual issues unworthy of review by this Court.

A. Contrary to petitioner's assertion (Pet. 10-11), no conflict among the circuits arises from the court of appeals' use of Rule 11 of the Rules of Civil Procedure to help define "conduct unbecoming" a lawyer under Rule 46 of the Rules of Appellate Procedure. The Seventh Circuit, like its sister circuits, recognizes that Rule 11 sanctions are not directly applicable to appeals. Pet. App. 10a. See also *Leigh* v. *Engle*, 858 F.2d 361, 370 n.5

(7th Cir. 1988), cert. denied, 109 S. Ct. 1528 (1989) (citing *Hays* v. *Sony Corp.*, 847 F.2d 412, 419-420 (7th Cir. 1988)).

Rather, the Seventh Circuit's position, which it followed in this case, is that Rule 11's prohibition of assertions not well grounded in fact or law " 'help[s] to define conduct becoming a member of the bar' " under Rule 46. Pet. App. 10a (quoting *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986)). Simply stated, it is unprofessional conduct for a lawyer to make substantial misrepresentations of fact or law in an appellate brief. This proposition can scarcely be doubted. See, *e.g.*, *In re Disciplinary Action Boucher*, 837 F.2d 869, 871, modified, 850 F.2d 597 (9th Cir. 1988) ("[c]ounsel's professional duty 'requires scrupulous accuracy in referring to the record' ") (quoting *Markowitz & Co.* v. *Toledo Metropolitan Housing Auth.*, 608 F.2d 699, 704 (6th Cir. 1979)); *Paulik*, 796 F.2d at 460 (flagrant misrepresentations of the record are "a gross violation of the high standards of professional conduct" required of members of the bar). *Cf. Brookhaven Landscape & Grading Co.* v. *J.F. Barton Contracting Co.*, 681 F.2d 734, 735 (11th Cir. 1982) (attorney may be censured under Rule 46 for failing to make "a complete and accurate presentation of the issue presented for review * * * and its disposition in the court below").

The courts of appeals have a strong interest in deterring such conduct. As the Ninth Circuit has explained,

> The burden of ascertaining the true state of the record would be intolerable if misrepresentation was common. The court relies on the lawyers before it to state clearly, candidly, and accurately the record as it in fact exists.

Boucher, 837 F.2d at 871. The importance of accuracy in the statements of a brief is also reflected in the Seventh Circuit's Rule 28, which requires that the Statement of Facts be a "fair summary" (Cir. R. 28(d)(1))

and that every fact stated in it be supported by a page reference to the record or appendix (Cir. R. 28(d)(2)).

This Court recently examined the parallel proscription on "conduct unbecoming a member of the bar" in Rule 46(b)[10] and concluded that the phrase "must be read in light of the 'complex code of behavior' to which attorneys are subject." *In re Snyder*, 472 U.S. 634, 644 (1985). As the Court noted (*id.* at 645):

> [I]t is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice.

"More specific guidance," the Court added, "is provided by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *Ibid.* Rule 11 certainly falls within that description, and misstatements and misrepresentations are unquestionably highly "inimical to the administration of justice."[11]

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[10] Rule 46(b) governs the sanctions of suspension or disbarment, while Rule 46(c) governs "less serious" sanctions such as the fine imposed on petitioner. See *In re Snyder*, 472 U.S. 634, 643 n.5 (1985).

[11] Under *Snyder*, therefore, the standards of conduct required by Rule 46 will evolve in conformity with the professional obligations that the rule incorporates. *Snyder* refutes petitioner's contention (Pet. 11) that the courts of appeals may not enforce a new or expanded professional obligation under Rule 46 "without first obtaining a change in the Appellate Rules." Moreover, contrary to petitioner's assertion (Pet. 10-11), the requirement that lawyers refrain from making misrepresentations in their pleadings was not an innovation of the 1983 amendment to Rule 11. That amendment imposed on attorneys the responsibility to make "reasonable inquiry" into the factual and legal basis for statements made in documents filed with the court. See Notes of Advisory Committee on Rules. Condemnation of the kind of misstatements and misrepresentations in appellate briefs that occurred in this case predates the 1983 amendments. See, *e.g.*, *Markowitz & Co.*, 608 F.2d at 704.

It is hardly surprising, therefore, that none of the cases cited by petitioner holds that a court of appeals lacks authority under Rule 46 to discipline an attorney for making factual and legal misrepresentations of a kind that could also be condemned under Rule 11. In *Webster* v. *Sowders*, 846 F.2d 1032, 1039-1040 (6th Cir. 1988), for example, the court of appeals' power was not even at issue; the court simply held that because Rule 11 does not directly apply to appeals, the *district court* could not impose Rule 11 sanctions for a frivolous appeal. Likewise, *Braley* v. *Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (en banc), merely states in dictum that Rule 11 authorizes sanctions only "at the trial court level."

Because there is no question that a court of appeals may discipline an attorney for significant misrepresentations of fact or law, there remains only the fact-bound question whether this $1,000 fine—which was moderate in amount and well within the normal range—was warranted.[12] Considering the number and seriousness of petitioner's misstatements, there is no reason for this Court to expend its limited resources to review that question.

As the court of appeals noted (Pet. App. 11a), the "most egregious" misrepresentation in petitioner's brief was the claim in the Statement of Facts (Appellant's Br. 3) that the union "has been cited by this court [the Seventh Circuit] for its disgraceful hiring and employment record." Even under the most expansive reading, nothing in the Seventh Circuit opinion cited by petitioner remotely implies that the court disapproved of the union's practices, let alone that it formally "cited" the union for those practices. See Pet. App. 11a n.4. Offered the op-

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[12] Indeed, the entire amount that petitioner was required to pay —the appellees' costs plus $1,000—could have been assessed against him solely under Rule 38, which authorizes an award of "just damages and single or double costs to the appellee." See also cases cited at pp. 14-15, *supra*.

portunity at oral argument to explain his serious charge against the union, petitioner merely asserted—despite the obvious import of his language—that he never meant to suggest that the court of appeals had condemned the union. Given petitioner's failure to offer any justification, the court of appeals rightly regarded his falsehood as worthy of censure. As the court of appeals put it (Pet. App. 11a), there is "no better example of a pleading not well grounded in fact or law than a brief that falsely imputes a particular position to this court."

As the court of appeals also noted (Pet. App. 11a), this was not petitioner's only significant misrepresentation. In addition, petitioner's brief contained the following errors:

> (1) Petitioner asserted (Appellant's Br. 3) that "[n]o one disputes that both the union and the Sun-Times have a dismal record" of minority hiring—although both parties had vigorously defended their hiring records.
>
> (2) Petitioner asserted (Appellant's Br. 5) that Lylbum French "was later fired after filing a race discrimination charge," which plainly suggests a retaliatory discharge by the Sun-Times. That assertion was highly misleading.[13]
>
> (3) Petitioner represented that the district court had "held that Plaintiff presented a *prima facie* case" (Appellant's Br. 10-11)—when the court had actually said that "[w]hile it seems that plaintiff may have *failed* to present a prima facie case, the court will

[13] Petitioner now insists (Pet. 8 n.2) that he really meant to say that French had been fired by the Sun-Times after filing a race discrimination charge *against the union*. But that is not what his brief said, and that is not how the court of appeals reasonably interpreted his representation. See Pet. App. 11a. Rather, the conveniently vague sentence in the brief strongly suggested that the party that fired French—which could only have been the Sun-Times—was the party against which French had earlier filed a discrimination charge.

assume for purposes of analysis that plaintiff has met his burden" (Pet. App. 20a (emphasis added)).

(4) Petitioner badly distorted the district court's reason for disregarding Myers' and French's statements concerning the requirement of lift truck experience. Petitioner asserted that the court had held their statements irrelevant "because their knowledge was based on service under a prior supervisor" (Appellant's Br. 13), thus omitting the court's additional reason that they had been hired "prior to [the] 1984 Sun-Times rule requiring full-timers to have lift truck experience" (Pet. App. 21a).

In sum, petitioner's pattern of serious misrepresentations and mischaracterizations fully warranted the court of appeals' conclusion that he had engaged in "conduct unbecoming a member of the bar."

B. Petitioner's objection to the process by which Rule 46 sanctions were imposed likewise raises no issue requiring further review. Undeniably, as the court of appeals recognized (Pet. App. 13a-14a), Rule 46(c) permits disciplinary action only "after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested." The rule does not specify, however, what constitutes reasonable notice or an adequate hearing.

Petitioner completely ignores the Seventh Circuit's case law in suggesting (Pet. 11) that that court fails to provide the procedural protections that other circuits afford. In numerous recent cases, the Seventh Circuit has adhered strictly to the formalities and terminology of Rule 46(c), denominating its notice of possible sanctions an "order to show cause" and giving the attorney an opportunity to respond and to request a separate hearing. See, *e.g.*, *United States* v. *Dominguez*, 810 F.2d 128 (7th Cir. 1987) (order to show cause; no response or request for hearing); *In re Kelly*, 808 F.2d 549 (7th Cir. 1986) (show-cause order, responsive brief, and oral hearing); *United States* v. *Ford*, 806 F.2d 769, 770 (7th Cir. 1986) (order to show cause; no hearing requested); *United*

States v. *Gerrity*, 804 F.2d 1330 (7th Cir. 1986) (order to show cause; no response or request for hearing); *United States* v. *Bush*, 797 F.2d 536, 537, 538 n.2 (7th Cir. 1986) (order to show cause; no hearing requested); *El-Gharabli* v. *INS*, 796 F.2d 935, 940 n.13 (7th Cir. 1986) (order to show cause; attorney requested hearing "if there are any further questions"). There is simply no errant practice in the court of appeals that requires this Court's correction.

There also is no question that petitioner received notice of and an opportunity to respond to the union's request that the court of appeals impose sanctions for his misrepresentations. Therefore, the cases cited in the petition (Pet. 11 n.5) that implicitly or explicitly require some notice and opportunity to respond do not conflict with the court of appeals' action here. The union's brief asked for sanctions, and both appellees' briefs identified the specific misstatements here at issue. Petitioner chose in his three-page reply brief not to defend or explain *any* of his assertions (or even to acknowledge that a request for sanctions had been made), although, if any explanation were available, he could and should have offered it not only for his own sake but also in order to protect his client's case on the merits. In addition, petitioner received a face-to-face hearing at oral argument, when the panel questioned him at length concerning the veracity of his statements. Finally, petitioner had the opportunity to present his case against the sanctions in his petition for rehearing. The court of appeals read and considered his petition and later even modified its opinion (Pet. App. 13a-14a) although it found no ground to modify the sanctions themselves. At no time did petitioner ever request a separate hearing on the issue of sanctions, as Rule 46(c) expressly contemplates.

Petitioner argues (Pet. 13-14) that a request for Rule 38 sanctions does not put counsel on notice to defend his misrepresentations because the question of frivolousness is different from the question of misrepresentation.

In this case, however, the union based its request for sanctions specifically on petitioner's misrepresentation of Seventh Circuit precedent (*i.e.*, on petitioner's false statement that the court of appeals had "cited" the union for its "disgraceful" hiring practices) and on his other misstatements and unsupported allegations. Union Br. 9 n.4, 13. The law is well established that such misstatements and misrepresentations warrant sanctions under both Rules 38 and 46. See pp. 14-15, 16-18, *supra*.[14]

The provision of separate notice and a hearing under Rule 46 would have offered no additional protection in a case such as this one. Appellees' briefs identified all misrepresentations that eventually supported the Rule 46 disciplinary action. The court at oral argument gave petitioner an ample opportunity to justify or explain his conduct. In particular, the "most egregious" misstatement under Rule 46 (Pet. App. 11a), the distortion of previous Seventh Circuit precedent, was fully explored at oral argument.

The hearing that petitioner received at oral argument extended not only beyond what was necessary in this case, but beyond what parties exposed to sanctions usually receive in similar contexts. This Court, for example, rarely provides an oral hearing before assessing damages for a frivolous appeal or petition for certiorari under S. Ct. R. 49.2 (see, *e.g.*, *Hyde* v. *Van Wormer*, 474 U.S. 992 (1985); *Tatum* v. *Regents of the University of Nebraska-Lincoln*, 462 U.S. 1117 (1983)), or even before removing an attorney from the bar of the Court. See S. Ct. R. 8 (providing only for an "opportunity to show good cause, within 40 days, why disbarment should not be effectuated"). Likewise, Rule 11 motions are often decided on written submissions alone, for "[i]n many situa-

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[14] We do not comprehend petitioner's assertion that the union "did not argue that mere misrepresentations could be grounds for punishment." Pet. 13. The union's brief called for sanctions based on petitioner's "scurrilous and unsupported" distortion of Seventh Circuit precedent. Union Br. 9 n.4.

tions the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Fed. R. Civ. P. 11, Advisory Committee Note (1983).

This Court has often emphasized that the requirement of a "hearing," whether contained in the Due Process Clause or in other authorities, is "intensely practical," and "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved." *Goss* v. *Lopez*, 419 U.S. 565, 578, 579 (1975).[15] Because petitioner was fully apprised of the outstanding request for Rule 38 sanctions and had a full opportunity to defend the misstatements for which Rule 46 sanctions eventually were imposed, further procedural formalities would have constituted a futile gesture wasteful of the time and resources of both court and counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Accord *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 239, 241 (1973) ("[t]he term 'hearing' in its legal context undoubtedly has a host of meanings," including, in that case, "evidentiary submission[s] in written form only").